APPENDIX A

[Filed Sep. 16, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-3524/3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio

OPINION

Before: SUHRHEINRICH, DAUGHTREY, and GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. Lee Kunkle brought an action against U-Haul Co. of Cleveland ("U-Haul") and certain of its officials and affiliates, alleging that his employment with U-Haul was terminated in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (1994) (the "ADA"), and Ohio state law. The matter ultimately proceeded to trial by a jury, which returned a verdict in favor of Kunkle and awarded him $950,000 in damages. The district court entered judgment accordingly, and thereafter denied each of U-Haul's post-

judgment motions. U-Haul now appeals from the judgment asserting that the district court erroneously denied both its motion for judgment as a matter of law, and its motion for a new trial or, in the alternative, remittitur. For the reasons set forth below, we AFFIRM the judgment as entered by the district court.

I. BACKGROUND

Kunkle, who began his employment with U-Haul in 1963, became Shop Manager at U-Haul's truck-repair shop in Akron, Ohio ("the Akron shop") in October of 1990. As Shop Manager, he reported directly to J.P. White, one of U-Haul's officers.

In January of 1994, Kunkle was diagnosed with cancer of the left lung. He was subsequently admitted to Akron City Hospital ("the hospital"), where he underwent surgery for the removal of his left lung on February 11, 1994. On February 24, 1994, Kunkle's wife Betty applied on his behalf for disability benefits with Oxford Life Insurance Company ("Oxford"). Kunkle's surgeon indicated on the application form that Kunkle had been "totally disabled" as of February 7, 1994. Oxford granted the application and began issuing payments in March of 1994. Kunkle also applied for disability insurance benefits with the Social Security Administration ("SSA") on May 21, 1994. He stated in support of the application that he "became unable to work because of [his] disabling condition on February 11, 1994." The SSA granted the application and began issuing payments in August of 1994.

In May of 1994, while Kunkle was recuperating from surgery, White hired Terry Mislevy to replace Kunkle as Shop Manager of the Akron shop. Moreover, White promoted Bill Folk, who had been a mechanic at the Akron shop, to the position of Shop Foreman. At that time, White and Folk agreed that Kunkle would replace Folk as Shop Foreman if Kunkle became well enough to return to work. The U-Haul job description for the position of Shop Foreman provides in relevant part as follows:

PRIMARY FUNCTION: Under the direction of the Shop Manager in a repair location, or other designated supervisor at other repair locations, supervise the profitable operation of all repair activities at the shop. Select, train, supervise shop personnel and maintain cross training program for new personnel. Initiate wage increases, promotions, transfers, disciplinary action and terminations. Ensure that work area is maintained in a clean and orderly manner and that personnel comply with good safety practices and regulation.

. . . .

Physical/Mental Health Requirements: Walking, climbing, stooping, reaching, pushing, talking, depth perception, crawling, crouching, lifting (min. 50lbs.), handling, hearing, standing, kneeling, carrying, digital dexterity, seeing, working speed, balancing, turning, sitting, throwing, feeling, color vision. Mental requirements include, but are not limited to, the ability to concentrate, take initiative, cope with stress, adapt to and stay alert in a business environment, and to use independent judgment to accomplish results.

Kunkle was finally discharged from the hospital on May 24, 1994. He nevertheless remained in serious condition. He was bedridden, required supplemental oxygen, breathed through a trachea tube, and ate through a stomach tube. In August of 1994, he was diagnosed with inoperable cancer in his left chest wall, and subsequently underwent a two-month regimen of outpatient radiation and an intensive three-month cardio-rehabilitative program.

In January of 1995, Kunkle informed White that he was ready to return to work. One week later, Kunkle met personally with White and Mislevy. At the meeting, White mentioned that Kunkle was being considered for a position in Cleveland, Ohio. Kunkle said that he was not

interested in such a position because he did not want to commute to Cleveland.

Kunkle reported back to work on February 15, 1995. This is when he first learned that he would be serving as Shop Foreman rather than as Shop Manager. His salary, however, remained at the level it had been when he was Shop Manager. Despite returning to work, Kunkle continued to receive disability benefits from the SSA under a program allowing recipients to work on a trial basis when there is uncertainty as to whether the recipient has fully recovered and is able to return to permanent employment.

David Bross, who worked at the Akron shop as a repairman, said that he believed that Kunkle was being set up for termination "because he was brought back as a foreman." Bross also testified that he asked Folk why he had not returned his Shop Foreman uniforms after Kunkle replaced him. Folk responded that he was told by Mislevy to keep the uniforms "because he might need them in a month or so."

White testified that Mislevy informed him of several deficiencies in Kunkle's job performance as Shop Foreman. In particular, Mislevy told White that Kunkle was not charging batteries at the Akron's shop's battery-changing station in a timely manner. White elaborated that Kunkle "was using the mechanics who were being paid, you know, a mechanic has to make his time each week, and getting specific jobs done and [Kunkle] was interrupting some of the mechanics because he needed help to lift the batteries for them to be charged." Mislevy, however, did not advise White as to the amount of mechanics' time that had actually been used to assist Kunkle in lifting batteries. Kunkle's testimony indicates that he asked mechanic Andrew Banks for assistance on only two occasions, and asked no other mechanic for such assistance at any time. Banks testified that each occasion on which Kunkle requested his assistance lasted "[a]pproximately

10 to 15 minutes." Kunkle said that before his surgery in February of 1994, batteries were tested, charged, and replaced solely by the mechanics in the Akron shop.

White also testified that Mislevy informed him that Kunkle was not properly ordering parts, thereby delaying truck repair. Mislevy, however, did not specify the number of times that Kunkle improperly ordered parts or the nature of the problem. White further testified about Mislevy's account of instances where Kunkle "was really gasping for breath[.]" Mislevy testified as to one particular instance when Kunkle "looked very pale and had shortness of breadth." Folk testified that Kunkle occasionally "went out to [his] truck to get oxygen."

On March 20, 1995, White terminated Kunkle's employment with U-Haul. White said that he did so because Kunkle "was not physically capable of doing that job." Kunkle testified that he was "almost at a loss for words" when White so informed him, and he repeatedly asked White for the actual reason for his termination. White consistently responded that Kunkle was not physically capable of lifting or moving either batteries or tires, particularly "JH" tires, which weigh approximately 150 lbs. Kunkle, however, repeatedly denied White's assertions to the effect that he was not physically capable of doing the job. Kunkle told White that he had never been asked to move a JH tire.

Later that evening, White telephoned Kunkle at home and simultaneously spoke to Kunkle and his wife, Betty Kunkle. According to Betty Kunkle's testimony, Kunkle repeatedly pressed White for the actual reason for his termination, speculating that it may have been his job performance. White responded by assuring Kunkle that "you did nothing wrong, it's just that you are physically unfit."

Although White testified as to his understanding that Mislevy confronted Kunkle "on at least one or two occasions" regarding deficiencies in Kunkle's job performance,

White did not personally discuss the same with Kunkle before terminating him. Moreover, White issued Kunkle no written reprimand or suspension prior to terminating him, notwithstanding U-Haul's progressive discipline policy of issuing a verbal warning and then a written warning prior to termination. Mislevy confirmed at trial that he prepared no documentation indicating that Kunkle's job performance was deficient. Mislevy also testified that he was not familiar with U-Haul's progressive discipline policy.

In August of 1995, Kunkle filed a three-count complaint against U-Haul and certain of its officials and corporate affiliates. Counts one and two of the complaint set forth claims for employment discrimination under the ADA and Ohio Rev. Code § 4112.02, respectively. Count three set forth a claim for intentional infliction of emotional distress under Ohio law. Each count sought compensatory and punitive damages, among other relief.

In April of 1996, the defendants jointly moved for summary judgment on each count of the complaint. The district court ruled in favor of the individual defendants on all counts, and ruled in favor of the corporate defendants on count three (the claim for intentional infliction of emotional distress), a well as the claims for punitive damages in counts one and two. The matter thereafter proceeded to trial by jury against the corporate defendants on counts one and two.

The jury ultimately returned a verdict in favor of Kunkle and awarded him $950,000 in damages. After the district court entered judgment accordingly, U-Haul brought several post-judgment motions, including a motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), and a motion for a new trial or, in the alternative, for remittitur under Fed. R. Civ. P. 59(a) and (e). The district court denied all of U-Haul's motions in an order entered on April 9, 1997. U-Haul now appeals from the judgment, asserting that the district court errone-

ously denied both its motion for judgment as a matter of law, and its motion for a new trial or, in the alternative, remittitur.

II. ANALYSIS

A. U-Haul's Motion for Judgment as a Matter of Law

This court reviews *de novo* the disposition of a motion for judgment as a matter of law. *Cook v. American Steamship Co.*, 53 F.3d 733, 740 (6th Cir. 1995). Such a judgment may be rendered only when no reasonable juror could find in favor of the nonmoving party. *Id.* In reviewing a Rule 50(b) motion, therefore, "we do not weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury." *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 825 (6th Cir. 1997). Rather, we view the evidence in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences. *Id.*

The ADA provides in relevant part that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the . . . discharge of employees[.]" 42 U.S.C. § 12112(a) (1994). A "disability" within the meaning of § 12112(a) is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual[.]" 42 U.S.C. § 12102 (2)(A). The term "substantially limits" as it appears in § 12102(2)(A) "means an inability to perform or a significant restriction on the ability to perform as compared to the average person in the general population." *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998) (citing 29 C.F.R. § 1630.2(j)(1)). " 'Major life activities' include 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.' " *Cassidy*, 138 F.3d at 633 (quoting 29 C.F.R. § 1630.2(i)).

A "qualified individual with a disability" within the meaning of § 12112(a) is defined as "an individual with

a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). In determining whether a particular employment function is "essential" for purposes of § 12111(8), the following factors may be considered: the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the position; the amount of time spent performing the function; the consequences of not requiring the incumbent to perform the function; the work experience of past incumbents in the job; and/or the current work experience of incumbents in similar jobs. *See* 29 C.F.R. § 1630.2(n)(3).

In *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996), this court held that when an employer admits reliance upon a disability in making an adverse employment decision, an employee may establish a *prima facie* case of employment discrimination under the ADA by showing that he or she (1) has a disability, and (2) is "otherwise qualified" for the position. *Id.* at 1186. The burden then shifts to the employer to establish that "a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer." *Id.* The foregoing standard also applies to a *prima facie* case of employment discrimination under Ohio Rev. Code § 4112.02. *See Hoffman v. Fidelity Brokerage Servs., Inc.*, 959 F. Supp. 452, 457 n.1 (S.D. Ohio 1997) ("The essential elements of a claim under the ADA and the Ohio handicap discrimination statute are the same. Therefore, the caselaw regarding claims brought under the ADA applies equally to claims brought under the Ohio statute.").

In the present case, White testified at trial that he terminated Kunkle because Kunkle "was not physically capable of doing that job." White's determination that

Kunkle "was not physically capable of doing that job" was based solely on Kunkle's purported inability to lift or carry either batteries or tires, specifically JH tires, which weigh approximately 150 lbs. Although the testimony of White and Mislevy indicated that deficiencies in Kunkle's job performance factored in the decision to terminate him, the jury was entitled to conclude otherwise in light of U-Haul's failure to issue either verbal or written warnings pursuant to its progressive discipline policy and, most significantly, Betty Kunkle's testimony as to White's statement that his termination of Kunkle was unrelated to Kunkle's job performance.

Viewing the evidence in the light most favorable to Kunkle, we are satisfied that Kunkle established a *prima facie* case of employment discrimination under the ADA and Ohio Rev. Code § 411202. First, the testimony at trial revealed that Kunkle experienced difficulty breathing and occasionally went to his truck to retrieve oxygen. Indeed, Kunkle's breathing condition was significant enough that Mislevy felt compelled to inform White about it. Under these circumstances, a reasonable juror could have concluded that Kunkle had a significant breathing restriction as compared to the average individual, a function expressly recognized as a "major life activity" under the ADA. *See* 29 C.F.R. § 1630.2(i). Accordingly, we find that Kunkle met his burden of establishing that he had a disability.

Second, the evidence at trial revealed that while the physical requirements pertaining to the position of Shop Foreman are extensive, the position is essentially supervisory in nature. Although the physical requirements enumerated in U-Haul's job description include "lifting (min. 50 lbs.)," conspicuously absent from the job description is any mention that the position involves *repetitive* lifting or moving of objects weighing 50 lbs., such as batteries, or the lifting or moving of objects weighing three times that amount, such as JH tires. Indeed, the testimony at trial indicates that Kunkle requested assist-

ance with batteries on only two occasions, each of which occupied only ten to fifteen minutes of mechanic Banks's time. Moreover, Kunkle testified that before his surgery in February of 1994, batteries were tested, charged, and replaced solely by the mechanics in the Akron shop.

Based upon the written job description prepared by U-Haul, the relatively brief amount of time Kunkle spent working with batteries, and Kunkle's testimony that he had never been asked to move a JH tire, a reasonable juror could have concluded that the function of lifting and carrying of batteries and JH tires was not "essential" to the position of Shop Foreman. In light of Kunkle's prior work experience as Shop Manager and with the U-Haul organization in general, a reasonable juror could have concluded that he was perfectly capable of performing those functions that were genuinely "essential" to the position of Shop Foreman, even with no accommodation from U-Haul. Accordingly, we are satisfied that Kunkle met his burden of establishing that he was "otherwise qualified" for his position.

Because Kunkle successfully met his burden of establishing that he had a disability and was "otherwise qualified," the burden shifted to U-Haul to establish that the function of lifting and carrying batteries and JH tires was "essential," and therefore a business necessity. *See Monette,* 90 F.3d at 1186. We are satisfied that U-Haul failed in this regard. Our review of the testimonial and documentary evidence introduced at trial indicates that U-Haul put forth virtually no evidence from which a reasonable juror could conclude that the lifting and carrying of batteries and JH tires was "essential" to the position of Shop Foreman, and therefore a business necessity. Accordingly, U-Haul is not entitled to judgment as a matter of law, and the district court properly denied its post-judgment motion for the same.

In so holding, we note that U-Haul initially asserted that Kunkle should have been judicially estopped from

claiming that he is "otherwise qualified" in light of representations that he and his physicians made to the SSA and Oxford regarding his physical condition. U-Haul relied primarily upon *McNemar v. Disney Store, Inc.*, 91 F.3d 610 (3rd Cir. 1996), in which the Third Circuit affirmed a district court's determination that an ADA claimant was judicially estopped from asserting that he was "otherwise qualified" when he had made representations to government agencies "that he is totally disabled and unable to work." *Id.* at 613.

At oral argument, however, U-Haul conceded that its argument concerning the applicability of judicial estoppel in this context has since been foreclosed by this court's decisions in *Blanton v. Inco Alloys Int'l, Inc.*, 123 F.3d 916 (6th Cir. 1997), *supplementing* 108 F.3d 104 (6th Cir. 1997), and *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376 (6th Cir. 1998). Accordingly, we need not address the merits of U-Haul's argument that Kunkle should be judicially estopped from asserting that he is "otherwise qualified" within the meaning of the ADA.

We also note that U-Haul maintains that it is entitled to judgment as a matter of law because Kunkle failed to propose any accommodation, and refused to accept a reasonable accommodation offered by U-Haul in the form of the position in Cleveland, Ohio. We are satisfied, however, that the issue of reasonable accommodation need not be reached in light of our determination that a reasonable juror could have concluded that Kunkle was perfectly capable of performing the "essential functions" of the position of Shop Foreman even without such accommodation.

B. U-Haul's Motion for a New Trial or, in the Alternative, Remittitur

This court reviews for an abuse of discretion the dispositions of a motion for a new trial or, in the alternative, remittitur. *See Strickland v. Owens Corning*, 142 F.3d

353, 358 (6th Cir. 1998). Accordingly, the district court's denial of such a motion must be affirmed unless this court is left with "a definite and firm conviction that the trial court committed a clear error of judgment." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

U-Haul asserts on appeal that the district court erroneously denied its motion for a new trial or, in the alternative, remittitur. U-Haul argues in support of its position that the jury's verdict in favor of Kunkle was against the great weight of the evidence. Moreover, U-Haul argues that any award of damages was subject to the $100,000 statutory cap as set forth under 42 U.S.C. § 1981a(b)(3)(B) (1994). In addition, U-Haul argues that the $950,000 award of damages was grossly excessive. Finally, U-Haul argues that the jury's verdict was tainted by prejudicial statements made at trial by Kunkle's counsel and several witnesses.

We are satisfied that the district court did not abuse its discretion in denying U-Haul's motion for a new trial or, in the alternative, remittitur. In so ruling, we rely upon the reasons set forth by the district court at pages 10 through 13 of its MEMORANDUM OF OPINION dated April 4, 1997. We believe that a detailed analysis of these issues by this court would be duplicative and would serve no jurisprudential purpose.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment as entered by the district court.

APPENDIX B

[Filed June 3, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:95CV1912
Judge John M. Manos

LEE KUNKLE,

Plaintiff,

v.

U-HAUL SYSTEMS, *et al.*,

Defendants.

MEMORANDUM OF OPINION

On August 29, 1995, Lee Kunkle, the plaintiff, filed the above captioned case against the U-Haul Systems, Cleveland Rental Equipment Shop, U-Haul Company of Cleveland (collectively, "U-Haul"), J.P. White, Robert A. Miner, and Terry Mislevy ("the individual defendants"), the defendants. He alleges that he was discharged in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (Count I) and Ohio Rev. Code § 4112 (Count II). He also alleges intentional infliction of emotional distress (Count III). Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1343 and 1367.

On April 12, 1996, the defendants filed a motion for summary judgment, and on April 29, 1996, Kunkle responded. For the following reasons, the motion is granted in part, and denied in part.

I.

On May 13, 1963, Kunkle was hired by U-Haul. In October 1990, he began working as shop manager at its truck repair shop in Akron, Ohio. He reported to White, president of the company.

In January 1994, Kunkle was diagnosed with lung cancer. In February 1994, he took a medical leave of absence to undergo surgery, telling White that he expected to be off work for six weeks. After his left lung was removed, he went into a coma and and remained on a respirator for eight weeks. In May 1994, White hired Mislevy to replace Kunkle.

In July 1994, Kunkle was discharged from the hospital. On July 16, 1994, he was awarded $1,088.00 per month of Social Security benefits, which he has received to date.

In August 1994, Kunkle was diagnosed with inoperable cancer in his left chest wall. Thereafter, he underwent outpatient radiation treatment for two months. In December 1994, he was discharged from his rehabilitation program at the hospital

In January 1995, White and Mislevy met with Kunkle regarding his return to work. White told him that his doctor would have to approve his return. On January 17, 1995, Dr. Lonsdorf sent a note to White stating that Kunkle is "able to return to work." (Defs. Ex. E.)

On February 13, 1995, Kunkle reported to work as shop foreman, working directly under Mislevy. He was paid the same as when he was shop manager. He alleges that he was able to perform his work. However, on March 20, 1995, he was told he was discharged because he was not "physically capable of handling [his] job." (White Depo at 135.)

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 256 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. *Anderson*, 477 U.S. at 247-48.

III.

Individuals who are not employers are not personally liable under the ADA. *U.S. Equal Opportunity Comm. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995); *see Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (citations omitted); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir.) *cert. denied*, 115 S.Ct. 574 (1994); *Bremiller v. Cleveland Psychiatric Institute*, 879 F.Supp. 782, 787-88 (N.D. Ohio 1995);[1] *cf. Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486, 571 N.E.2d 428, (1991).[2] Therefore, Kunkle may not hold the individual defendants liable for employment discrimination. Accordingly, the individual defendants' motion for summary judgment is granted on Counts I and II.

A.

In an employment discrimination claim, the plaintiff bears the burden of proving a prima facie case and rebutting any legitimate, nondiscriminatory explanations proffered by the employer for its actions.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

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[1] Individual defendants are not liable under Title VII or the Age Discrimination in Employment Act.

[2] Individual liability under Ohio Rev. Code § 4112 has been limited to cases of sexual harassment.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 242-53 (1981) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).[3] The burden of persuasion always rests on the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2747 (1993).

To establish a prima facie case of employment discrimination under the ADA, a plaintiff must prove that he: (1) has a disability; (2) is qualified to perform the essential functions of the job with or without reasonable accommodation; and, (3) has suffered an adverse employment action because of his disability. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995).

The defendants argue that Kunkle cannot prevail on his claim because, by receiving Social Security benefits while he returned to work, he is estopped from asserting that he was qualified to perform his work. *See Reiff v. Interim Personnel, Inc.*, 906 F.Supp. 1280, 1289-92 (D.Minn. 1995). However, representations by a plaintiff that he is entitled to disability benefits is not dispositive of whether he is not qualified to work. Rather, it is only a factor to consider. *Morton v. GTE North, Inc.*, —— F.Supp. ——, 1996 WL 84830, *11-12 (N.D.Tex. 1996) (citing *Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992)). Moreover, Kunkle introduces evidence that he was qualified to return to work, and the Social Seurity Administration permitted him to work on a trial basis while he received benefits. (Pl.'s Ex. 11, 28.)

Kunkle also introduces evidence which, if believed, may establish that he was qualified to perform the essential functions of his job. He had work experience of 30 years without any written disciplinary reports against him.

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[3] Claims brought under Ohio Rev. Code § 4112 prohibiting employment discriminaton should be analyzed in the same manner as claims brought under federal law. *See Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm'n*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128, 131 (1981).

(Pl.'s Aff. ¶¶ 2-7.) He was recognized for his technical skills. (*Id.* 8-9; Pl.'s Ex. 4, 6; White Depo. at 47.) His doctor approved his return to work after reviewing his job description. (Pl.'s Ex. 11, 12.) He asserts that he never refused to perform his assignments and that all absences were authorized by his supervisors. (Pl.'s Aff. ¶¶ 33, 37.) Therefore, a justiciable issue exists as to whether he was discharged because he was not qualified to perform his work. Accordingly, U-Haul's moton for summary judgment is denied on Counts I and II.

B.

An employer may be liable for punitive damages if it engaged in discriminatory behavior with malice or reckless indifference to its employee's federally protected rights. 42 U.S.C. § 1981a(b)(1). Kunkle introduces evidence that his job description required him to lift heavy tires and that White asked him to see a doctor to determine his fitness for work. This evidence, even if believed, does not amount to malice or reckless indifference to the rights of Kunkle. Therefore, he may not recover punitive damages.[4]

IV.

In Count III, Kunkle charges the defendants with intentional infliction of emotional distress. The standard for intentional infliction of emotional distress in Ohio is set forth in *Yeager v. Local Union 20,* 6 Ohio St.3d 369, 453 N.E.2d 666 (1983). In *Yeager,* the court quoted the Restatement (Second) of Torts § 46(1) (1965):

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotion

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[4] Moreover, Kunkle is not entitled to punitive damages under Ohio Rev. Code § 4112.99. *See Hitchings v. Weese,* No. 95-CA-539 (Holmes Cty. App. Dec. 8, 1995) (citing *Hinderegger v. Dairy and Nutrition Council,* No. CA-9297 (Stark Cty. App. Nov. 15, 1993)); *but see Delaney v. Skyline Lodge, Inc.,* 95 Ohio App.3d 264, 269 n.3, 642 N.E.2d 395, 399 (Hamilton Cty. 1994).

> distress to another is subject to liabiilty for such emotional distress. . . .

Yeager, 6 Ohio St.3d at 374, 453 N.E.2d at 671.

The court also defined the terms "extreme and outrageous."

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Yeager, 6 Ohio St.3d at 375, 453 N.E.2d at 671 (quoting Restatement (Second) Torts § 46, cmt. d (1965)). "[P]laintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." *Id.*

The conduct alleged by Kunkle is not "so outrageous . . . as to go beyond all possible bounds of decency." *Id.* In addition, there is not evidence that the defendants acted with the knowledge that his injuries were certain to occur. *See McNeil v. Case Western Reserve Univ.,* 1995 Ohio App. LEXIS 3127 at *7 (Cuyahoga Cty. July 27, 1995) (citing *Fyffe v. Jeno's Inc.,* 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991)). Accordingly, summary judgment is granted on Count III.

V.

In conclusion, the defendants' motion for summary judgment is granted with respect to claims against the individual defendants and Count III.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX C

[Filed June 3, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:95V1912
Judge John M. Manos

LEE KUNKLE,

Plaintiff,

v.

U-HAUL SYSTEMS, *et al.*,

Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above captioned case this date, the defendants' motion for summary judgment is granted in part and denied in part. Count III is dismissed, and all claims against White, Miner, and Mislevy are dismissed.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX D

[Filed Apr. 4, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:95V1912
Judge John M. Manos

LEE KUNKLE,

Plaintiff,

v.

U-HAUL SYSTEMS, *et al.*,

Defendants.

MEMORANDUM OF OPINION

On August 29, 1995, Lee Kunkle, plaintiff, filed the above-captioned action against U-Haul Systems, Cleveland Rental Equipment Shop, U-Haul Company of Cleveland (collectively "U-Haul"), J.P. White, Robert A. Miner and Terry Mislevy (collectively the "individual defendants"), alleging that he was discharged in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (Count One), and Ohio Revised Code ("ORC") § 4112 *et seq.* (Count Two). He also alleged intentional infliction of emotional distress (Count Three).

On June 3, 1996, the Court, in response to a Motion for Summary Judgment, issued a Memorandum of Opinion and Order: (i) dismissing the individual defendants from the action; (ii) denying summary judgment as to

Counts One and Two against U-Haul; and (iii) granting summary judgment as to Count Three (intentional infliction of emotional distress) and punitive damages.

On June 17, 1996, a jury trial commenced. On June 25, 1996, the jury returned a verdict in favor of the plaintiff and awarded damages of $950,000.

On July 10, 1996, U-Haul filed a motion for Judgment as a Matter of Law ("Motion for Judgment"), a Motion to Amend"), and a Motion for New Trial or Remittitur ("Motion for New Trial/Remittitur"). On July 23, 1996, the plaintiff responded to all motions. Both parties have since filed supplemental briefs.

For the following reasons, all motions are hereby DENIED.

I. FACTS

A. Trial Testimony

The following evidence was presented at trial:

Kunkle began working for U-Haul in May of 1963. (Tr. at 47.) Throughout his thirty year employment, he held a number of positions in both the manufacturing and retail divisions of the company (Tr. at 47-53.) On October 1, 1990, he was promoted to Shop Manager of the Truck Repair Shop ("Repair Shop") in Akron, Ohio. (Tr. at 51-52.) He reported directly to J.P. White, President of U-Haul Company of Cleveland.[1] (Tr. at 36, 44.)

In January 1994, Kunkle was diagnosed with lung cancer. (Tr. at 279-80.) He was referred to a cario-

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[1] U-Haul Company of Cleveland is a wholly-owned subsidiary of U-Haul International, which, in turn, is held by the holding company Americo. (Tr. at 36.) At trial, White testified that he had never heard of "U-Haul Systems" or the "Cleveland Rental Equipment Shop," both of whom were named as defendants in this action. (Tr. at 36-37.) On June 19, 1996, Kunkle filed a motion to add U-Haul International as a defendant, arguing that U-Haul Systems and U-Haul International were synonymous. On June 24, 1996, the

thoracic surgeon for immediate surgery. (*Id.*) He informed White of his condition and indicated that he would be out six weeks. (Tr. at 61.) In his absence, Rudy Lazlo and Bill Folk were temporarily assigned to perform his duties. (Tr. at 61.) White assured him that his job would be held open until his return. (Tr. at 65.)

On February 11, 1994, Kunkle was admitted to Akron City Hospital for surgery. (Tr. at 281.) After his left lung was removed, he lapsed into a coma and remained on a respirator for eight weeks. (Tr. at 283-84.) He was diagnosed with adult respiratory distress syndrome and had only a 5% chance of survival. (Tr. at 285.)

In May 1994, White hired Terry Mislevy to replace Kunkle as Shop Manager for the Repair Shop. (Tr. at 67.) Despite his eighteen years of service with U-Haul, Mislevy had no experience within the manufacturing division. (Tr. at 68.) Thus, White created the position of Shop Foreman and promoted Bill Folk, formerly a mechanic.[2] (Tr. at 67.) Folk agreed that if Kunkle recovered and returned to work, he would relinquish his position and resume working as a mechanic. (Tr. at 69.)

Kunkle eventually awoke from the coma and began to improve. (Tr. at 417.) In May 1994, he was discharged from the hosiptal and taken home. (*Id.*) His physical condition, however, was still serious; he had lost more than sixty pounds and was totally bed-ridden. (Tr. at

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Court, after hearing arguments of counsel, denied the motion. (Tr. at 637-40.) Thus, U-Haul Company of Cleveland is the only defendant properly before this Court.

[2] The position of Shop Foreman required significantly more physical exertion than that of Shop Manager. (Tr. at 675.) The Shop Foreman was responsible for the operation of the repair floor, supervising mechanics, assigning work, performing both pre- and post-inspections of the trucks (which entailed crawling under and on top of the trucks), refueling the trucks, and operating the battery charging station. (Tr. at 106-07.) The Shop Manager position, in contrast, largely consisted of paperwork, computer work, and restocking parts. (Tr. at 674.)

417-18.) He required supplemental oxygen, was breathing through a trachea, and ate through a tube in his stomach. (Tr. at 417-18.)

In August 1994, Kunkle was diagnosed with inoperable cancer in his left chest wall. (Tr. at 287.) He underwent outpatient radiation treatment for two months. (Tr. at 288.) He also participated in a cardio-rehabilitative program at Akron General Medical Center and began to gradually improve. (*Id.*) On December 30, 1994, he was discharged from the program. (Tr. at 290.)

On January 10, 1995, Kunkle told White that he was ready to return to work. (Tr. at 492.) One week later, Kunkle met White and Mislevy at a Denny's Restaurant. (Tr. at 72.) White informed him that U-Haul needed a doctor's release before he could return to work. (*Id.*) White testified that at this meeting he indicated that Kunkle would be returning as Shop Foreman rather than as Shop Manager. (*Id.*) Kunkle denies that this was discussed. (Tr. at 494.)

On February 13, 1995, after procuring a note from Dr. Kevin Lonsdorf, his family physician, Kunkle reported to work. (Tr. at 293, 502.) He claims that Mislevy informed him, for the first time, that he was to be Shop Foreman. (Tr. 503.) He was paid the same as when he was Shop Manager.(Tr. at 72.)

Kunkle testified that he was able to perform the duties of Shop Foreman, but acknowledged that he needed assistance operating the battery charging station. (Tr. at 514.) White, in turn, testified that Kunkle had not adequately performed his job duties. (Tr. at 94-99.) On March 20, 1995, White discharged Kunkle, claiming that he "was not physically capable of doing [the] job." (Tr. at 101.)

B. The Verdict

On June 17, 1996, a jury trial commenced. After hearing the evidence, the jury found that Kunkle had been

discharged because of his disability and awarded him $950,000 in damages.

I.

A. Motion for Judgment as a Matter of Law [3]

U-Haul first moves for judgment as a matter of law, arguing that (1) Kunkle is estopped from claiming to be a "qualified individual with a disability," and (2) Kunkle did not provide any evidence of discrimination. The Court finds that neither argument has merit.

As the primary basis for its motion, U-Haul resurrects the argument that Kunkle is estopped from being a "qualified individual with a disability" by statements that he and his physician made to the Social Security Administration and his private insurance carrier.[4] This theory was first raised in U-Haul's pretrial Motion for Summary Judgment. The Court, after careful consideration, refused to apply estoppel under the facts of the case. *See* June 3, 1996 Memorandum of Opinion, Docket No. 97, at 6. To the extent that U-Haul has merely re-stated its earlier argument, the Court declines to revisit the issue and stands by its prior ruling.

U-Haul, however, argues that Dr. Lonsdorf's testimony at trial, evidence not previously before the Court, lends

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[3] When ruling on a motion for judgment as a matter of law, a court "should not weigh the evidence, evaluate the credibility of witnesses, or substitute its judgment for that of the jury; rather, it must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences." *Black v. Ryder*, 15 F.3d 573, 583 (6th Cir. 1994).

[4] In order to receive Social Security and private disability benefits, Kunkle and his physican, Dr. Kevin Lonsdorf, certified on several occasions that he was "totally disabled," *i.e.*, incapable of working. U-Haul argues that, based upon these earlier statements, Kunkle cannot now claim to be "otherwise qualified," *i.e.*, capable of working. The Court rejected application of this theory in its earlier Memorandum of Opinion. *See* June 3, 1996 Memorandum of Opinion, Docket No. 97, at 6.

further support for application of estoppel principles. At trial, the following exchange occurred:

> Q: So in your opinion on April 28, 1995, as you related to Oxford Insurance Company, Mr. Kunkle was totally disabled with respect to performing any other work, is that correct?
>
> A: Correct.
>
> Q: Is that still your opinion today?
>
> A: Yes.

(Tr. at 340.) U-Haul claims the above testimony represents an admission by Dr. Lonsdorf that Kunkle is totally disabled and, as such, he cannot be considered a "qualified individual" for purposes of the ADA and ORC § 4112.

The Court does not agree. Careful examination of Dr. Lonsdorf's testimony, when viewed in its entirety, shows that the doctor believed Kunkle could perform all duties of Shop Foreman with the exception of the battery charging station.[5] (Tr. at 343.) Dr. Lonsdorf concluded that Kunkle was "disabled" only after learning of the lifting involved in operating the battery station; thus, had U-Haul assigned that responsibility to another employee (or allowed Kunkle to request assistance), Dr. Lonsdorf clearly believed Kunkle could perform as Shop Foreman. Moreover, Dr. Lonsdorf later clarified that when he characterized Kunkle as "disabled," he was referring only to Kunkle's ability (or inability) to act as Shop Foreman for U-Haul, not his capacity ability to perform any work. (*Id.*) Accordingly, the Court concludes that Kunkle is not estopped from claiming to be a "qualfied indivdual with a disability."[6]

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[5] Dr. Lonsdorf cautioned that Kunkle could not engage in heavy or repetitive lifting. (Tr. at 343.) However, other than with respect to the batery station, the duties of Shop Foreman did not require this type of activity on a regular basis.

[6] U-Haul also argues that because Kunkle acknowledged that he could not operate the battery station without assistance, he is now

As a second basis for its motion, U-Haul argues that Kunkle did not provide any evidence of discriminatory intent. However, viewing the evidence in the light most favorable to Kunkle, *see supra* n.3, sufficient evidence exists to support the jury's verdict. The jury could have reasonably concluded that Kunkle could perform all job responsibilities of Shop Foreman with the exception of the battery station; the battery station was not an "essential function" of the job; and that U-Haul refused him the "reasonable accommodation" of requesting assistance when operating the station, thereby violating the law.[7]

Accordingly, U-Haul's Motion for Judgment as a Matter of Law is DENIED.

B. Motion to Amend

Noting that reinstatement is the preferred remedy in employment discrimination cases, *see Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir.), *cert. denied*, 116 S.Ct. 77 (1995), U-Haul next moves the Court to amend the judgment by ordering the reinstatement of Kunkle in lieu of front pay damages presumably awarded by the jury.

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estopped from claiming to be "qualified" for the position. However, the jury could have reasonably concluded that operating the station was not an "essential function" of the job; thus, had U-Haul offered a "reasonable accommodation," *e.g.*, assigning the station to another employee or allowing Kunkle to request assistance, he could have performed the functions of Shop Foreman.

[7] The jury also may have questioned U-Haul's decision to reinstate Kunkle as Shop Foreman, a position that was more physically demanding than his prior experience as Shop Manager. David Bross, an employee at the Repair Shop, testified that he thought Kunkle was "doomed from the getgo" and "being set up for termination" due to the intense physical labor required as Shop Foreman. (Tr. at 268-69.) There was also evidence that, upon Kunkle's return, Mislevy instructed Folk to keep his Shop Foreman uniform because he may need it in a month. (Tr. at 265.)

The analysis of this issue is complicated by two factors: (1) prior to charging the jury, the Court did not articulate its reasons for determining that front pay was an appropriate remedy, *see Roush v. KFC Nat'l Mgmt. Co.*, 10 F.3d 392, 398-99 (6th Cir. 1993), *cert. denied*, 513 U.S. 808 (1994); and (2) the submitted verdict form did not require the jury to identify which portion of its award (if any) represented front pay.

"[A]n award of front pay must be governed by the sound discretion of the trial court." *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984). The propriety of a front pay award is a matter of law for the Court; the amount of such award is a question of fact for the jury. *Roush*, 10 F.3d at 398. While reinstatement is the "presumptively favored equitable remedy" in employment discrimination cases, it is not appropriate in every case. *Id.* at 398. Prior to submitting the issue of damages to the jury, a court should determine whether, after considering relevant and equitable factors, reinstatement or front pay would be a more appropriate remedy in the event the plaintiff prevails.[8] *Id.* at 398-99.

The Court did not articulate, in advance of submitting the case to the jury, whether it deemed an award of front pay to be appropriate. Nevertheless, the jury was properly instructed on the factors to be considered in determining the amount of front pay. *See Roush*, 10 F.3d at 398-99 ("This case highlights the most obvious reason why [a court should articulate its reasons that front pay is appropriate]: because the jury must be instructed on what factors to consider in determining the amount of front pay. . . .") The Court, in its jury instructions, explained "an employee's duty to mitigate . . . the employee's work

[8] For instance, the *Roush* court identified several instances where reinstatement would be inappropriate where the plaintiff has found other work, where it would result in the displacement of a nonculpable employee, or where hostility would result. *Id.*

and life expectancy, [and] the discount tables to determine the present value of future damages," all factors to be considered in awarding front pay.[9] *Id.* at 399.

The evidence at trial clearly supports the decision to instruct the jury on front pay. Kunkle testified that he could perform the duties of Shop Foreman, but acknowledged he needed assistance in operating the battery charging station. (Tr. at 504-14.) U-Haul took the position that its mechanics, who were paid on a per-task basis, could not afford to offer such assistance to Kunkle. (*See, e.g.*, Tr. at 94-95.) Thus, assuming that Kunkle was "otherwise qualified" to perform his position (as the jury so found), U-Haul apparently cannot offer the "reasonable accommodation" he needs in order to perform the duties of Shop Foreman. Under such circumstances, reinstatement would not be appropriate.[10]

Despite the opportunity to comment upon the jury instructions, U-Haul did not object to that portion of the charge dealing with front pay. (*See* Tr. at 705-12.) If, as U-Haul now alleges, it was "ready to offer unconditional reinstatement" should plaintiff prove successful, it was under an affirmative obligation to bring the matter to the

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[9] The instructions did not expressly address "the availability of employment opportunities and the period within which one, by reasonable efforts, may be reemployed," *see id.*; however, evidence regarding these matter was presented at trial and the jury presumably considered such factors in reaching its verdict.

[10] Evidence of animus against Kunkle was also adduced at trial. Kenneth Dulaney, a former U-Haul employee, related the substance of a conversation he had with Folk during an encounter at a local store. During this conversation, Folk claimed he would intentionally turn off the overhead exhaust fans in the shop in order to make it more difficult for Kunkle to breathe. (Tr. at 247.) Were Kunkle reinstated as Shop Foreman, he would replace Folk and thereafter act as his supervisor. The potential for hostility between these parties is a significant factor rendering reinstatement inappropriate. *See Roush*, 10 F.3d at 398.

Court's attention *at that time*, particularly when it had notice that the Court intended to charge front pay. (Motion to Amend at 2.) Moreover, U-Haul did not object to that portion of the Form of Verdict in which the jury was asked to return a general damages award.[11] Even were the Court now inclined to order reinstatement, U-Haul has not explained the method by which the Court may derive that portion of the $950,000 that represents front pay such as to properly remit the verdict.[12]

To amend the judgment at this stage would neither be proper nor feasible. Accordingly, the Motion to Amend is DENIED.

C. Motion for New Trial of Remittitur [13]

U-Haul finally moves the Court to grant a new trial or, alternatively, to remit the amount of the verdict, arguing: (1) the damage award was grossly excessive; (2) im-

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[11] Jury Interrogatory No. 4 asked: What amount of damages did the plaintiff sustain as a result of the conduct of the defendants? $_____

While U-Haul did not object to this portion of the Form of Verdict, Kunkle requested that the question be amended to require the jury to identify the various portions of its award (e.g., back-pay, front pay, compensatory damages). (Tr. at 754.) Unfortunately, Kunkle based his request over concern that the defendants would file post-judgment motions arguing the award was excessive. (*Id.*) No mention of reinstatement or front pay was raised. Had the Court been made aware of this issue, it would have been more inclined to modify the Form of Verdict in the manner suggested by Kunkle.

[12] Dr. Harvey Rosen, an economist, testified that Kunkle's future earnings loss, reduced to present value, was between $227,631 and $411,116. (Tr. at 364.) The Court has no method of determining which of these figures (if any) the jury relied upon in reaching its verdict and presumably awarding front pay.

[13] In ruling on a motion for a new trial, a court has wide discretion; it may consider the credibility of witnesses and weigh the evidence. *Hurley v. Atlantic City Police Dep't*, 933 F. Supp. 396, 403 (D.N.J. 1996).

proper statements by plaintiff's counsel inflamed and prejudiced the jury; and (3) the verdict was against the manifest weight of the evidence. The Court again finds that none of the arguments have merit.

U-Haul first argues that the $950,000 award was grossly excessive. It claims that pursuant to 42 U.S.C. § 1981a (3)(B), compensatory damages against a company of its size for violations of federal anti-discrimination laws are capped at $100,000.[14] Because the jury did not identify the various portions of its award such that the cap may be applied, *see supra* n.11, U-Haul requests the Court to order a new trial or reduce the award by $600,000-$700,000.

At no time prior to the verdict did U-Haul bring to the Court's attention that the statutory caps contained in 42 U.S.C. § 1981a(b)(3) were an issue in this case.[15] U-Haul did not object to the Form of Verdict in which the jury was asked to return a general damages award. *See supra* n.11. Thus, to the extent U-Haul argues that a

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[14] 42 U.S.C. § 1981a(b)(3) provides:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000. . . .

U-Haul has had more than 100 but less than 201 employees at all relevant times such as to qualify for the cap. *See* Affidavit of White, attached to Motion for New Trial/Remittitur as Exhibit A, at ¶¶ 3-5.

[15] Indeed, the issue was not raised until U-Haul, after retaining additional counsel, filed these post-judgment motions.

new trial must be granted because the statutory cap cannot be applied, it brought the situation upon itself.[16]

More importantly, the jury was charged under both the ADA and Ohio's anti-discrimination statute, ORC § 4112 *et seq.* Ohio law does not contain the statutory cap (or any analogous damages limitation) now relied upon by U-Haul. While the Supreme Court of Ohio has held that ORC § 4112 should be interpreted to parallel federal legislation, *see Plumbers & Steamfitters Comm. v. O.C.R.C.*, 421 N.E.2d 128, 131 (Ohio 1981), such interpretation does not extend so far as to engraft a federal statutory cap upon a state cause of action. Thus, the Court finds that even assuming the cap applies to Kunkle's claim under the ADA, it does not extend to his claim brought under ORC § 4112, and U-Haul is not entitled to a new trial or remittitur based upon this issue.[17]

U-Haul next takes issue with two comments made by plaintiff's counsel in the opening and closing arguments, contending that they were improper, misleading, and calculated to inflame the passion and prejudice of the jury. In his opening, plaintiff's counsel stated: "There will be testimony and there will be people who will raise their hand to God and look you in the eye and lie like a

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[16] Whether U-Haul can be deemed to have waived the statutory cap contained in 42 U.S.C. § 1981a(b)(3) is an issue the Court need not address due to the state law issue.

[17] The Court also disagrees with U-Haul's more general argument that, irrespective of the statutory cap, the damage award was excessive. While the amount of the award is clearly significant, Dr. Harvey Rosen, an economist, testified that Kunkle's combined economic losses (backpay and front pay) alone were between $297,731 and $481,216. (Tr. at 364.) Assuming the jury was guided by the larger figure, more than half of its verdict represents an equitable amount designed to "make the plaintiff whole," without consideration of pain, suffering, inconvenience or other compensatory damages. The Court concludes that the verdict is not so excessive as to require a new trial or remittitur.

bandit."[18] (Tr. at 23.) The second comment occurred during closing remarks, when counsel stated:

> Now, we know that Mr. White had promised to bring Mr. Kunkle back in that job. This job had been kept open as shop manager. They had to bring him back, no question about it. Their own policy and procedure basically says this, and Mr. White's own words when Mr. Kunkle went out, they had to bring him back.
>
> For opposing counsel to suggest, why would they bring him back and then get rid of him, he brought him back because he had no choice. He had to.

(Tr. at 748.)

U-Haul did not object timely to either comment,[19] and by so doing waived any objection unless the comments constituted plain error or a defect affecting substantial rights. *United States v. August*, 984 F.2d 705, 714 (6th Cir. 1992), *cert. denied*, 510 U.S. 854 (1993). The remarks in opening, while perhaps ill-advised, were nonetheless innocuous at best.[20] *See supra* n.18. Similarly,

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[18] Interesting, plaintiff's counsel did not indicate which side's witnesses would so act. He continued: "You have to sort through that and determine what you believe the evidence and the facts, the true facts support." (*Id.*) U-Haul does not explain how this comment prejudiced the jury, but argues that the comment was designed to "incite the jury's passion and sympathy for Mr. Kunkle." *Motion for New Trial/Remittitur* at 12.

[19] At the conclusion of closing arguments, at a conference in chambers, U-Haul expressed concern over counsel's closing comments and requested a curative instruction. (Tr. at 755.) The Court declined to issue an instruction, noting that U-Haul had not timely objected. (*Id.* at 755-56.)

[20] This finding likewise applies to the remarks of Betty Kunkle. When asked about Kunkle's physical progress after being released from the hospital, she replied: "He was determined to get better and I was determined to help him. We are a family of faith and we prayed and prayed while he was in intensive care. We had

even assuming that counsel's comments during closing were improper, the potential that such remarks caused juror prejudice or confusion is not so great as to warrant the granting of a new trial. *Id.*

Finally, U-Haul argues that the Court should grant a new trial because the verdict was against the manifest weight of the evidence. For the reasons expressed by the Court in denying the Motion for Judgment as a Matter of Law, *see supra* at 7, this argument is rejected.

Accordingly, the Motion for a NewTrial/Remittitur is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

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found a verse in the Bible that said that 'if you have faith as small as a mustard seed nothing is impossible.' Matthew 17:20. And that got us through it and we knew nothing was impossible; that he was going to make it." (Tr. at 415-16.) U-Haul cites this testimony to argue that the trial was "rife with unfairly prejudicial and extraneous testimony." *Motion for New Trial/Remittitur* at 14. What U-Haul neglects to note, however, is that it did not object to the testimony. Even were the Court to assume that the comment was somehow prejudicial, it clearly did not rise to the level of plain error. *See August*, 984 F.2d at 714.

APPENDIX E

[Filed Apr. 4, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:95CV1912
Judge John M. Manos

LEE KUNKLE,

Plaintiff,

v.

U-HAUL SYSTEMS, *et al.*,

Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Motion for Judgment as a Matter of Law is DENIED; the Motion to Amend is DENIED; and the motion for a New Trial/Remittitur is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX F

[Filed Nov. 24, 1998]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

97-3524/3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

ORDER

Upon consideration of the appellant's motion to hold the decision on its petition for rehearing en banc in abeyance pending the Supreme Court's decision in *Cleveland v. Policy Management Systems Corp., et al.*, No. 97-1008 (5th Circuit),

It is ORDERED that the motion be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX G

[Filed Nov. 24, 1998]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

97-3524/3578

U-HAUL CO. OF CLEVELAND,
Defendant-Appellant,

v.

LEE KUNKLE,
Plaintiff-Appellee.

ORDER

BEFORE: SUHRHEINRICH, DAUGHTREY, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Judges Nelson and Moore recused themselves from participation in this ruling.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX H

STATUTORY PROVISIONS INVOLVED

SOCIAL SECURITY ACT

42 U.S.C. § 423(d)(1), (2)

(d) "Disability" defined

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work

which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

AMERICANS WITH DISABILITIES ACT OF 1990

42 U.S.C. § 12102(2)

§ 12102. Definitions

As used in this chapter:

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111(8)

§ 12111. Definitions

As used in this subchapter:

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12112(a)

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.